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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners.

v.

EVELYN COKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ALLIANCE FOR RETIRED AMERICANS, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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The Alliance for Retired Americans (ARA), American Association of People with Disabilities (AAPD), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and Change to Win (CTW) file this brief *amici curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

The ARA is an organization of three million retired workers that advocates for the rights of older and retired persons. The AAPD is a membership organization that represents the interests of disabled Americans. Many members of the ARA and the AAPD receive care from agency-employed home care workers and each group has an interest in the salary and benefits that agency workers receive, as these factors affect the availability and quality of care. The AFL-CIO is a federation of 54 national and international labor organizations with a total membership of ten million working men and women. CTW is an alliance of seven national and international labor organizations with a total membership of six million working men and women. Among the workers represented by AFL-CIO and CTW affiliated unions are numerous home care and home health aides.

SUMMARY OF ARGUMENT

Congress amended the Fair Labor Standards Act (FLSA) in 1974 to expand coverage to employees whose vocation is domestic service, granting these workers the same protections and employment standards that most other workers enjoy. Agency-employed domestic service workers were generally entitled to FLSA coverage prior to the 1974 amendments, and thus the amendments primarily affected workers employed by individual households. A narrow category of workers was excluded from this expansion of coverage: workers employed by individual households to provide babysitting or companionship services.

Agency-employed home care workers perform the type of work that the 1974 Congress intended to cover under FLSA. They are engaged in a full-time vocation and depend on their wages to support their families. Their work is demanding and difficult, in contrast to the occasional tasks Congress envisioned for exempted companions. And they are employed by agencies that can easily comply with FLSA requirements,

unlike the individual household employers that Congress sought to protect through the companionship exemption.

Affirming the decision of the court below will not result in dire consequences for elderly and disabled home care clients or for the workers and agencies that serve them. Petitioners' and *amici*'s claims that FLSA coverage of agency-employed workers will decrease the quality or availability of home care services are speculative and untrue. To the contrary, as Congress recognized in 1974, providing coverage for these workers will help increase and stabilize the labor supply, which is currently insufficient to meet the rapidly growing demand for home care services.

ARGUMENT

In 1974, Congress amended the Fair Labor Standards Act ("FLSA") to cover domestic service workers employed in private households. 29 U.S.C. §§ 206(f) & 206(l). Prior to the 1974 amendments, domestic service workers employed by a third party employer were generally covered by the FLSA but domestic service workers employed directly by a household were not. 29 U.S.C. § 203(s)(1). Pet. App. 30a. The purpose of the 1974 amendments was to extend FLSA coverage to those domestic service workers who had previously been excluded, principally those employed directly by the household they served.

Congress excluded one group of domestic service workers from the expanded FLSA coverage—those "employed in domestic service employment" to provide either "baby-sitting services" or "companionship services." 29 U.S.C. § 213(a)(15). The "companionship exception" was intended to reach only those domestic service workers employed directly by the household they serve. That exception was not intended to contract FLSA coverage by excluding domestic service workers employed by third parties. The justification for the "companionship exception" was that households

should not be burdened with FLSA compliance with respect to a class of employees who were not likely to be pursuing domestic service as their principal source of income. As we now show, domestic service workers employed by third party employers are not part of this class.

I. CONGRESS EXEMPTED A NARROW GROUP OF INDIVIDUALS THAT DID NOT RELY ON DOMESTIC EMPLOYMENT FOR ESSENTIAL INCOME FROM THE 1974 FLSA EXTENSION TO HOUSEHOLD-EMPLOYED DOMESTIC WORKERS.

The 1974 FLSA amendments were intended "to include within the coverage of the Act *all employees whose vocation is domestic service*."[2] The expansion was premised on the understanding that many domestic service workers were responsible for the economic support of their families,[3] and that the wage they earned without FLSA coverage was inadequate to lift them out of poverty.[4] The one group that Congress did not consider to fall into this category was individuals employed directly by households to provide baby-sitting and companionship services. Thus, in discussing the "companionship exception," the Senate and House Committee reports explained that "[p]eople who will be employed in

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[2] S. Rep. No. 93-690, at 20 (1974) (emphasis added).

[3] *See, e.g.*, 120 Cong. Rec. 5276 (1974) (Representative Williams) (citing statistic that 200,000 female domestic workers were heads of families); 119 Cong. Rec. 18,347 (1973) (Representative Green).

[4] *See, e.g.*, 119 Cong. Rec. 24,827 (1973) (Senator Humphrey) (commenting that average wage of household workers was "not an adequate income for one person. But a large portion of these women are heads of households."); 119 Cong. Rec. 18,347 (1973) (Representative Green) (pointing out that two-thirds of domestic workers had dependent children, and that over half of these workers lived in poverty).

the excluded categories are not regular bread-winners or responsible for their families' support."[5]

In this regard, Senator Williams, Chair of the Labor Subcommittee, explained what was meant by the word "companion":

> We use the situation in which people are in a household not to do household work but are there, first, as baby-sitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters. "Companion," as we mean it, is in the same role—to be there and to watch an older person, in a sense.[6]

And, when another senator interjected, "In other words, an elder sitter," Senator Williams replied, "Exactly."[7]

Similarly, Senator Burdick observed that, unlike "the professional domestic who does this as a daily living," many individuals hire a "neighbor [who] comes in and sits with" an elderly parent.[8] While he acknowledged that babysitting and companionship services, "of course, entail[] some work," he characterized it as "perhaps making lunch for the children or making lunch for the infirm person, and may[be] even . . . throwing some diapers in the automatic washing machine for the baby."[9]

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[5] S. Rep. No. 93-690, at 20 (1974). *See also* H.R. Rep. No. 93-913, at 36 (1974) (Congress did not expect employees in those excluded categories to be "regular bread-winners or responsible for their families support"); S. Rep. No. 93-358, at 27 (1973) (same).

[6] 119 Cong. Rec. 24,801 (1973).

[7] 119 Cong. Rec. 24,801 (1973).

[8] 119 Cong. Rec. 24,801 (1973). *See also* 119 Cong. Rec. 24,797 (1973) (Senator Dominick reads letter from woman who explains she hires companion for her elderly mother; according to letter, companion spends time "watching TV, reading, relaxing, visiting with my mother, using [the] telephone, [and] eating").

[9] 119 Cong. Rec. 24,801 (1973).

In short, Congress meant to extend FLSA coverage to domestic service workers who relied on their employment as an essential source of income, and to exclude only those individuals engaged by a single household to watch over children or keep an elderly or disabled person company. This narrow exemption was never meant to cover the hundreds of thousands of home care workers who make domestic service their vocation.

II. HOME CARE WORKERS EMPLOYED BY AGENCIES ARE THE TYPE OF DOMESTIC WORKERS CONGRESS INTENDED TO COVER UNDER FLSA.

Home care agencies employ approximately 70%, or hundreds of thousands, of home care workers.[10] The agencies create full-time jobs by assigning home care workers to multiple households, allowing the agencies to dominate the labor market for home care services. There are more than 23,000 home care agencies in the United States.[11] For-profit agencies have assumed an increasingly dominant role in the home care industry, with a share of the market rising above

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[10] UCSF Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* 30 (Feb. 2006) (available at http://www.futurehealth.ucsf.edu/geria/062404-Geria%20Final.pdf) [hereinafter UCSF Health Workforce Studies].

[11] National Center for Health Workforce Analyses et al., *Nursing Aides, Home Health Aides, and Related Health Care Occupations – National and Local Workforce Shortages and Associated Data Needs* viii, 12 (U.S. Dep't Health and Human Servs.: 2004) (available at ftp://ftp.hrsa.gov/bhpr/nationalcenter/NursingAndHomeAides.pdf) [hereinafter Nat'l Ctr. for Health Workforce Analyses]. *See also* Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481, 5487 (2001) (to be codified at 29 C.F.R. pt. 552) (proposed Jan. 19, 2001) [hereinafter Application of the FLSA to Domestic Service]. Between 1975 and 1999 the number of Medicare-certified home care agencies increased three-fold. *Id.* 66 Fed. Reg. at 5483.

40% in the mid-1990s.[12] As of 1999, for-profit companies employed 62% of home health care aides.[13]

The workers employed by these agencies perform demanding personal, housekeeping and medical services for multiple households. Domestic service is their vocation and it provides them with essential family income. Agency-employed home care workers are not within the narrow class that Congress intended to exclude from the 1974 extension of FLSA coverage.

A. Agency home care work is a bread-winning vocation.

Domestic service is the primary vocation of the workers employed by home care agencies. Agency employees typically serve multiple households and do not know their clients before being assigned to them.[14] On average, each agency employee provides home care services to five or more house-

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[12] *See* Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 12 (for-profit ownership of home care agencies increased from 6 % in 1980 to 43% in 1995); Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483 (unaffiliated for-profit agencies had over 40% share of market by 2000).

[13] Rhonda J. V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45:5 Gerentologist 593, 596 (2005).

[14] Bureau of Labor Statistics ("BLS"), U.S. Department of Labor, *Occupational Outlook Handbook* 2006-2007 (available at http://www.bls.gov/oco/home.htm) (Personal and Home Care Aides) (most home care workers work with multiple clients, often visiting four to five on the same day); Jane Tilly & Joshua M. Wiener, *Consumer-Directed Home Care and Community Services: Policy Issues*, Occasional Paper No. 44, at 11-12 (The Urban Institute: 2001) (available at http://www.urban.org/publications/310065.html) (only 7% of California agency home care workers knew their client before they began providing services, as compared to three-quarters of individual providers).

holds in an eight-hour work day.[15] This stands in marked contrast to the ad hoc single-household employment that Congress intended to exclude from the 1974 expansion of FLSA coverage, through which companions typically sat with a single relative or friend.[16]

Home care work is generally full-time or close to it. Thus, in 1999, home care employees worked an average of 29-32 hours per week, not including time spent traveling between clients.[17] Travel time can be substantial given that home care workers "often visit four or five clients on the same day," and they "may spend a good portion of the working day traveling from one client to another."[18]

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[15] National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 15 (2001) (available at http://www.nahc.org/consumer/hcstats.html); National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 14 (2004) (available at http://www.nahc.org/04HC_stats.pdf).

[16] Studies of California home care workers who are employed by individual households rather than agencies show that close to two-thirds of household-employed individuals are related to the recipient of home care services and three-quarters knew the recipient before they began providing services. Michael R. Cousineau, *Providing Health Insurance to IHSS Providers (Home Care Workers) in Los Angeles County: Report to the California HealthCare Foundation* 11 (2000) (available at http://www.chcf.org/documents/insurance/ihss.pdf); Candace Howes, *Upgrading California's Home Care Workforce: The Impact of Political Action and Unionization* 94 (Univ. of Cal. Institute for Labor and Employment: 2004) (available at http://repositories.cdlib.org/ile/scl2004/03/); Tilly & Wiener, *supra* note 14, at 11-12.

[17] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483 (citing BLS National Current Employment Statistics). Some researchers report higher averages. *See, e.g.*, Yoshiko Yamada, *Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations*, 42:2 Gerontologist 199, 202 (2002) (reporting 34 hours usually worked per week).

[18] Bureau of Labor Statistics, *supra* note 14 (Personal and Home Care Aides). *See also id.* (Nursing, Psychiatric and Home Health Aides).

Even without counting travel time, a majority of home care aides work more than 35 hours per week.[19] Recent studies establish that 34-46% of home care workers work full-time year-round, and an additional 12-19% work full-time for part of the year.[20] The Department of Labor itself found that "[c]urrent data suggest that many workers in the home care industry are now employed in their primary occupation."[21] In contrast, most household-employed home care workers work for a single client,[22] and work less than half-time.[23]

Home care workers are two to three times more likely than other workers to be single heads of households.[24] Forty

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[19] H. Stephen Kaye et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25:4 Health Affairs 1113, 1118 (2006).

[20] Montgomery et al., *supra* note 13, at 595, 597; Yamada, *supra* note 17, at 202.

[21] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483. The trend of increased agency employment has been accompanied by an increase in these full-time numbers. *See* Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16:5 Home Health Care Management & Practice 339, 340 (2004) (citing statistics that percentage of full-time home care workers rose from 29% to 46% in decade between late 1980s and late 1990s).

[22] Household-employed individuals in California serve an average of 1.4 clients while agency workers average 4 clients. Tilly & Wiener, *supra* note 14, at 12-13.

[23] A study of Los Angeles home care workers employed directly by households determined that approximately one-third worked less than 10 hours average per week and another one-third less than 20. Cousineau, *supra* note 16, at 11. Another study found an average of less than 25 hours per week among household-employed home care workers in Los Angeles and San Francisco counties. Howes, *supra* note 16, at 94.

[24] William J. Scanlon (Director, Health Care Issues, General Accounting Office), *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions*, GAO-01-750T, at 22 (released May 17, 2001) (available at http://www.gao.gov/new.items/d01750t.pdf).

percent have children younger than 18.[25] The inadequacy of the wages they earn, *see infra* p. 25, means that the families they support often live below the poverty level and rely on public benefits programs for support.[26]

B. Agency home care work involves the type of domestic work that Congress intended to cover.

The work performed by agency home care workers is the type of work Congress intended the FLSA to cover. Agency-employed home care workers provide care and assistance to seriously disabled individuals. The level of services required by such individuals means that keeping clients company represents a negligible portion of the services provided by agency-employed home care workers. As the Department of Labor has acknowledged, "[t]hese workers perform a variety of housekeeping, personal care, and medical duties for individuals who need assistance with activities of daily living to enable them to remain in their homes."[27]

The work is very demanding. "[I]ndividuals treated as exempt in providing companionship services may now perform duties such as medication management, taking vital signs (pulse, temperature, respiration), routine skin and back care, and assistance with exercise and the performance of simple procedures as an extension of physical therapy ser-

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[25] Yamada, *supra* note 17, at 200-01.

[26] One in five home health care aides has income below the poverty level. Scanlon, *supra* note 24, at 13; Yamada, *supra* note 17, at 202-03. 35-40% of families headed by home health care and nursing home aides are in poverty, and 30-35% receive food stamps. Scanlon, *supra* note 24, at 22. Home health care aides are twice as likely as other workers to be receiving food stamps and Medicaid and to lack health insurance. *Id.* at 13.

[27] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483. *See also id.* at 5484 (home care workers who perform medical duties "are not acting simply as elder sitters or as babysitters watching over their charge").

vice."[28] They may also have responsibility to "keep patients' rooms neat; and help patients to move from bed, bathe, dress, and groom," and "[o]ccasionally, they change nonsterile dressings, give massages and alcohol rubs, or assist with braces and artificial limbs. Experienced home health aides also may assist with medical equipment such as ventilators, which help patients breathe."[29]

While home care aides have fewer health care-related responsibilities than do home health aides, their housekeeping and personal care responsibilities are still demanding, requiring them to "clean clients' houses, do laundry, and change bed linens[,] . . . plan meals (including special diets), shop for food, and cook[,] . . . help clients get out of bed, bathe, dress, and groom[,] . . . [and] accompany clients to doctors' appointments or on other errands."[30] Duties also typically include assistance with "toileting, bathing, eating, and transferring" their clients.[31]

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[28] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5484.

[29] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides). A federal government report gave the following estimates regarding the percentage of home health care clients requiring assistance with various activities: bathing or showering, 53%; dressing, 46%; transferring to or from a bed or chair, 30%; and toileting, 23%. Wan He et al., *65+ in the United States: 2005*, at 67 (U.S. Dep't Health & Human Servs. & U.S. Census Bureau: Dec. 2005) (available at http://www.census.gov/prod/2006pubs/p23-209.pdf).

[30] Bureau of Labor Statistics, *supra* note 14 (Personal and Home Care Aides).

[31] Paraprofessional Healthcare Institute, *The Right People for the Job*, 1:1 Workforce Tools 1, 2 (Fall 2002) (available at http://www.paraprofessional.org/publications/WorkforceTools_Vol1No1.pdf) (description of work developed under subcontract to MEDSTAT Group, Inc. under contract with federal government's Centers for Medicare & Medicaid Services). *See also* State Medicaid Manual, CMS Pub. 45 § 4480

The nature of the work takes a toll on the employees. Home health providers have 280.5 occupational injuries and illnesses involving days away from work per 10,000 full-time workers as compared to 188.3 for all private industries.[32] The injury rate in home care is worsened by the fact that, unlike in a nursing home, home care aides must lift and transfer clients without the help of a mechanical lifting device or the assistance of co-workers.[33] Home care workers often suffer emotional abuse from mentally impaired clients who may have severe behavioral problems.[34] Homes may be "untidy and depressing," and clients may be "angry, abusive, depressed, or otherwise difficult."[35]

C. Congress intended the exemption to apply to individual households, not to agency employers.

The legislative history of the 1974 amendments shows that Congress was concerned about the increased demands that FLSA compliance would place upon individual households. Opponents of the extension complained about "bring[ing] the Federal bureaucracy into the kitchen of the American house-

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(available at http://www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10) ("Personal care services" include assisting disabled individuals with "eating, bathing, dressing, toileting, transferring, and maintaining continence," as well as "personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management.").

[32] Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 10, 109.

[33] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides).

[34] UCSF Health Workforce Studies, *supra* note 10, at 33.

[35] Bureau of Labor Statistics, *supra* note 14 (Personal and Home Care Aides). *See also id.* (Nursing, Psychiatric and Home Health Aides); Jane Gross, *New Options (and Risks) in Home Care for Elderly*, N.Y. Times, Mar. 1, 2007.

wife," and cited Secretary of Labor Peter Brennan's prediction that "homemakers" would be unable to keep accurate records.[36]

Unlike individual households, however, agencies are traditional employers, with up to hundreds of thousands of home care employees serving clients in multiple locations.[37] Agencies routinely maintain employment records and comply with a multitude of labor and employment laws. The exemption Congress adopted was based on a concern about the burdens of such requirements, and that concern is simply inapplicable to agency employers.

Federal employment laws frequently distinguish households from other employers. The Social Security Act, for example, does not permit agencies to take advantage of special provisions that exempt household-employed domestic workers, exclude non-cash remuneration from wages, and permit household employers to round the amount of wages.

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[36] S. Rep. No. 93-300, at 121 (1973) (Minority Views). *See also* H.R. Rep. No. 93-232, at 95 (1973) (Minority Views) (questioning wisdom of subjecting housewives to criminal penalties for failing to keep required records); 119 Cong. Rec. 18,155 (1973) (Representative Erlenborn) (complaining about imposition of record-keeping requirements upon housewives who employ workers for less than a day per week); *id.* (Senator Fannin) ("I just cannot imagine the housewife struggling with the paper work which would be required."); *id.* at 24,385 (Senator Beall) (arguing that expecting housewives to keep FLSA records is unrealistic); *id.* at 24,798 (Senator Dominick) (questioning why government should require private individuals to maintain records).

[37] *See* Gross, *supra* note 35; *Gentiva At a Glance*, http://www.gentiva.com/about/AtAGlance.asp; *About TLC Health Care Services*, http://www.tlcathome.com/AboutUs/tabid/52/Default.aspx; *Press Release: The Accredited Family of Home Care Services celebrates 25 years of excellence* (Apr. 14, 2005) (available at http://www.accreditednursing.com/pdf/Press%20Release%20E%20Format.pdf; *Addus HealthCare Services: Company Profile*, http://www.addus.com; *Our History and Services*, http://www.interimhealthcare.com/about/staffingstory.aspx.

See Respondent's Br. at 19-20.[38] Similarly, the National Labor Relations Act's exclusion of persons employed "in the domestic service of any family or person at his home" from its definition of "employee," 29 U.S.C. § 152(3), does not apply to domestic workers employed by agencies. *See Ankh Services, Inc.*, 243 NLRB 478, 480 (1979). And the regulation exempting certain employers of domestic workers from the Occupational Safety and Health Act applies only to "individuals who, in their own residences, privately employ persons" who perform certain domestic tasks. 29 C.F.R. § 1975.6. Limiting the companionship exemption to employees of households is consistent with this pattern of federal employment regulation.

III. AFFIRMING THE SECOND CIRCUIT'S DECISION WILL NOT PRODUCE THE DIRE CONSEQUENCES PREDICTED BY PETITIONERS AND *AMICI*.

Petitioners and *amici* warn that FLSA coverage of agency-employed home care workers will result in increased costs and require agencies to reduce aides' overtime hours, thus disrupting continuity of care and reducing the services available to clients. Those claims are unfounded and resemble arguments that were unsuccessfully advanced in opposition to the 1974 FLSA amendments.

The actual experience in numerous states where laws already require third-party employers of home care workers to pay a minimum wage (in some cases, higher than the

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[38] Even before the Social Security Act was amended in 1950 to remove the exemption of domestic workers and to add these provisions, the exemption was construed to apply only to domestics employed by households. *See* 26 C.F.R. § 403.809 (1949) ("Services of a household nature performed by an employee in or about the private home of the person by whom he is employed, . . . are included within the above exception.").

federal minimum) and premium pay for overtime belies the unsupported predictions of doom. Many state minimum wage and overtime laws have no companionship exemption at all,[39] or exempt only live-in companions.[40] Others exempt companions only if they are employed directly by a household or family member.[41] Neither Petitioners nor *amici* offer

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[39] *See, e.g.*, 820 Ill. Comp. Stat. 105/3(d), 105/4(a)(1), 105/4a and Ill. Admin. Code tit. 56, § 210.110 (exempting individuals employed in domestic service but defining category to exclude "person whose primary duty is to be a companion for individual(s) who are aged or infirm"); Kan. Stat. Ann. §§ 44-1202(e)(2), 44-1203, 44-1204 and Kan. Admin. Regs. § 49-30-1(h) (exempting employees providing domestic service, defined to include "an individual employed by an owner or tenant in a private home to clean, repair or maintain the private home or the property on which the private home is located, but does not include an individual employed by a person contracting to perform the service"); Minn. Stat. §§ 177.23(11), 177.24, 177.25 (providing only that "nighttime" hours worked by employee providing "companionship services" are not hours worked if the employee is merely available to perform duties but does not actually do so). *See also* Md. Code Ann., Lab. & Empl. §§ 3-413, 3-415 (minimum wage and overtime law with no relevant exceptions); N.J. Stat. Ann. § 34:11-56a4 (same); W. Va. Code §§ 21-5C-1 *et seq.* (same); Mass. Gen. Laws ch. 151, §§ 1-3 (same) and Opinion Letter MW-2002-020, Mass. Dept. of Labor, Div. of Occupational Safety (July 19, 2002), *available at* www.mass.gov/dos/mw_docs/mw-2002-020.htm (stating that home health aides covered); Neb. Rev. Stat. § 48-1201 *et seq.* (minimum wage laws with no relevant exceptions); S.D. Codified Laws § 60-11-3 (same).

[40] *See, e.g.*, Mich. Comp. Laws §§ 408.383, 408.384, 408.394(2)(a) (covering all employees providing companionship services except "live-in domestic service employee"); Nev. Rev. Stat. §§ 608.018, 608.250 (exempting only domestic servants that "reside in the household where they work").

[41] *See, e.g.*, Alaska Stat. §§ 23.10.055(4), 23.10.060, 23.10.065 and Alaska Admin. Code tit. 8, § 15.910(a)(6) (exempting persons "employed in or about a private home of a person by whom the individual is employed"); 7 Colo. Code Regs. § 1103-1(1) to -1(6) (exempting "companions, casual babysitters, and domestic employees employed by households or family members to perform duties in private residences"); Haw. Rev. Stat. § 387-1 to -3 (exempting individuals employed "in domestic

any evidence that such state laws have resulted in financial ruin to agencies or the disruption of continuous care to severely disabled individuals.

Opponents of the 1974 amendments warned that the extension of coverage to domestic workers would make their labor too costly and reduce the demand for their services.[42] But the 1974 Congress rejected these admonitions in favor of providing domestic workers with the same protections and minimum standards that applied to other workers.

As we now show, Petitioners' and *amici*'s claims about the consequences of coverage are unsupported, and it is in fact

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service in or about the home of the individual's employer"); Mont. Code Ann. §§ 39-3-404, 39-3-405, 39-3-406 (exempting employees providing companionship services only "when the person providing the service is employed directly by a family member or an individual who is a legal guardian"); 43 Pa. Cons. Stat. §§ 333.104, 333.105(a)(2) and 34 Pa. Code § 231.1(b) (exempting "domestic service in or about the private home of the employer," and defining such service not to include work for an "employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation"); Wash. Rev. Code §§ 49.46.010(5)(b), 49.46.010(5)(j), 49.46.020, 49.46.130 (exempting "[a]ny individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession" and "[a]ny individual whose duties require that he or she reside or sleep at the place of his or her employment"); Wis. Admin. Code DWD §§ 272.03, 272.06, 247.015, 274.03 (exempting from minimum wage only "casual employment in or around a home in work usual to the home of the employer, and not in connection with or part of the business, trade or profession of the employer" for not more than 15 hours per week, and "companions in private homes," defined as "[p]ersons who reside in the employer's household for the purpose of companionship and who spend less than 15 hours per week on general household work"; and exempting from the overtime law only "[e]mployees employed in domestic service in a household by a household").

[42] *See, e.g.*, S. Rep. No. 93-300, at 121 (1973) (Minority Views) (quoting Secretary of Labor Peter Brennan's concern that "the housewife can substitute her labor" for a domestic employee's).

the continued undervaluing of home care aides' work—and the resulting labor shortage—that presents the greatest concern to society.

A. Predictions that FLSA coverage will harm the quality and availability of care are speculative and untrue.

The predictions of harm by Petitioners and their supporting *amici* rest largely upon unsupported conjecture, not the realities of the current home care market. And the purported concern about the affordability of home care services is unconvincing coming from agencies that earn profits and pay home care workers significantly less than the amount they receive from the government to provide such services. A recent study by UCSF researchers found that agency reimbursement rates under federal Medicaid programs exceeded those for household-employed home care workers by an average of 27-39% ($13 per hour as compared to $8-9 per hour).[43] Nonetheless, home care employees of agencies "ultimately earned an hourly wage a little over the Federal minimum wage" and "[h]ealth care and other benefits were generally not provided."[44] Thus, these agencies are in a better position than households to absorb additional costs without reducing services or passing on costs to consumers or the government.

Two additional factors undermine assertions that overtime costs will burden agencies and force home care agencies to assign multiple workers to large numbers of clients. First, clients generally receive less than 40 hours of service per week. Most applicable state Medicaid programs place limits on the number of hours that they will fund, with the limit

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[43] Allen J. LeBlanc et al., *State Medicaid Programs Offering Personal Care Services*, 22:4 Health Care Financing Rev. 155, 165 (2001).

[44] LeBlanc et al., *supra* note 43, at 165.

averaging 4.8 hours per day.[45] Those states that have not adopted hourly limits tend to impose cost caps upon clients which indirectly limit the hours of service.[46] Petitioners and *amici* have not offered any evidence that, despite these limits, substantial numbers of clients in jurisdictions other than New York receive more than forty hours of services per week. Second, to the extent agency-employed home care aides are working more than 40 hours per week, evidence suggests it is in order to serve multiple clients, not a single individual.[47] Thus, the number of clients requiring round-the-clock care is unlikely to be large enough to support the predictions of financial disaster.[48]

Finally, government sources pay three-quarters of all home health care spending,[49] and provide extensive funding for

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[45] LeBlanc et al., *supra* note 43, at 162. Of the fifteen states with service limits, seven do not permit the limits to be exceeded and eight allow exceptions with prior authorization. *See* General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101, at 23, 75-76 (May 1999).

[46] LeBlanc et al., *supra* note 43, at 162.

[47] National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 15 (2001) (available at http://www.nahc.org/consumer/hcstats.html)(agency employees in the 25th percentile of visits per eight-hour day served 4.2 clients daily.)

[48] In any event, there is a separate overtime exemption that covers live-in aides. 29 U.S.C. §213(b)(21).

[49] U.S. Dep't of Health and Human Servs., Centers for Medicare and Medicaid Services, *National Health Expenditures by Type of Service and Source of Funds*, CY 1960-2005 (2005 figures can be found at www.cms.hhs.gov/NationalHealthExpendData/downloads/nhe2005.zip); The Caregiving Project, *Caregiving in America* 34 (Schmieding Foundation) (available at http://www.schmiedingcenter.org/pdf/caregiving_in_america.pdf) (citing Cynthia Smith et al., *National Health Spending in 2004*, 25:1 Health Affairs 186-96 (2006)). That figure is for home health care only, and does not include personal care services. The remainder of the funding comes from the following sources: 12% private health

approved personal assistance in the activities of daily living for elderly and disabled individuals.[50] Thus, governments can avoid or mitigate any negative ramifications of FLSA coverage by adjusting reimbursement rates to enable providers to comply with the FLSA.[51]

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insurance, 11.3% out-of-pocket, and 2.3% other private. The Caregiving Project, *supra*, at 34.

[50] LeBlanc et al., *supra* note 43, at 155. The Department of Labor has found that Medicare and Medicaid contribute 55% of the money paid to freestanding agencies, philanthropy accounts for 12%, private health insurance 11%, and out-of-pocket funds just 22%. Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483. Other federal programs that fund home care include Title XX Social Security block grants; Title III Older American Act funds; the Department of Veterans Affairs Aid and Attendance Program; and Title II, Section 203 of the Ticket to Work and Work Incentives Improvement Act of 1999. LeBlanc et al., *supra* note 43, at 156. State and local governments also contribute substantially and are increasingly turning to alternative, non-Medicaid sources of funding for in-home care. UCSF Health Workforce Studies, *supra* note 10, at 57.

[51] 42 U.S.C. § 1396a(a)(30)(A) requires state Medicaid plans to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Accordingly, New York, for example, makes the minimum wage a factor to be considered in setting personal care services reimbursement rates, and permits providers to request revisions of their rates for new or unanticipated costs beyond their control. N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(6)(ii)(d); *id.*, tit. 18, § 505.14(h)(7)(iii)(c)(2). In addition, increased compensation costs due to FLSA coverage could be addressed through wage pass-through legislation, a strategy employed by a number of States already. *See* Dorie Seavey & Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* 7-8 (American Ass'n of Retired Persons: 2006) (available at http://assets.aarp.org/rgcenter/il/2006_18_care.pdf).

B. FLSA coverage will help increase and stabilize the labor supply to meet the growing demand for home care services.

Congress extended the FLSA to domestic employment in the belief that improving labor standards would attract more workers to the occupation. Thus, Senate Committee Report No. 93-300 explained:

> It is also important to note that even in a period of high unemployment such as exists today, the demand for household workers is not being met. Bringing domestics under the Fair Labor Standards Act would not only assure them a minimum wage but would enhance their status in the community. It is expected that the supply of domestic workers will increase as their pay and working conditions improve. Minimum wages should serve to attract skilled workers to these jobs at a time when the need for skilled domestic employees is greatly increasing.[52]

Congressional supporters of the extension of coverage endorsed this rationale. Senator Williams noted that, "[d]uring the past 13 years, the number of domestic service employees in the country has been reduced by half at a time when the demand for domestic services rose by 33 percent," and warned, "[i]f these trends continue, a much-demanded occupation will have been reduced to near oblivion."[53] Other lawmakers highlighted the relationship between extending

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[52] S. Rep. No. 93-300, at 21 (1973). *See also* S. Rep. No. 93-690, at 19 (1974) (same); 119 Cong. Rec. 24,360 (1973) ("[I]n many areas of the country, including New York, . . . there are not enough workers willing to engage in domestic employment to meet the demand. Bringing minimum wage coverage to domestics will be one step, and a very important step, to bringing some measure of dignity to this type of employment and thus serve to attract a more qualified and more stable workforce to the job.").

[53] 119 Cong. Rec. 24,799 (1973).

FLSA coverage and restoring the labor pool.[54] Senator Javits stated, "The more the job becomes dignified and recognized

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[54] *See, e.g.,* 119 Cong. Rec. 24,802 (1973) (Senator Javits) "[N]o wonder we have a pool of people who do not want the jobs; they are not paid adequately. The argument is strong for this kind of measure in the elementary sense of restoring the pool of labor for the work. . . . I believe we will have more and better domestic workers with this kind of policy than otherwise."); 119 Cong. Rec. 24,828 (1973) (Senator Humphrey) ("[I]n the last decade, over 70,000 persons have left domestic work, precisely because the pay is so low. . . . [W]e are not going to increase the number of domestic workers, unless and until the domestic can be assured some kind of fair compensation for her work."); 119 Cong. Rec. 18,347 (1973) (Representative Green) ("This is a group whose numbers are shrinking drastically as demand for workers is increasing. . . . [W]e talk about it being difficult to get domestic workers. Until we are willing and able to pay a living wage, until we the Congress, are willing to bring them under the minimum wage, the problem will remain."); 119 Cong. Rec. 30,270 (1973) (Representative Jordan) ("Employment in the field of domestic work has been declining for some time, largely because of the poor wages and the lack of advancement. Applying minimum wage coverage to domestic workers would give some semblance of dignity to this menial labor."); 119 Cong. Rec. 30,281 (1973) (Representative Metcalfe) ("The demand for domestic workers is increasing at a time when there is a shortage of such workers. Although competent domestic help is in high demand the pay continues to be grossly inadequate."); 119 Cong. Rec. 30,271 (1973) (Representative Mitchell) (citing drop in supply of domestic workers by one million in past decade and attributing same to inadequate wage); 119 Cong. Rec. 18,380 (1973) (Representative Mink) (noting "the number of domestics employed in households across the United States declined by 70,000 between 1960 and 1970" and attributing that drop to low pay in the industry; "By increasing the pay, we should make these positions more attractive and add new employment opportunities."); 120 Cong. Rec. 5270 (1974) (Representative Williams) ("In a little over 10 years the work force employed in domestic service has been cut in half during a period when the demand and needed for domestic workers has increased by one-third. Part of that, I am sure, is the fact of the low wages that do prevail and the lack of coverage. . . . [I]f the employment is given the dignity it deserves, by coverage under the Fair Labor Standards Act, maybe those working women and those who need help in their homes will have an adequate supply of those who need the work and want the

as honorable employment, such as any other employment—working in a factory or working here—the better it will be from the point of view of getting that kind of service, which Americans so urgently need."[55]

Similarly, today, groups representing elderly and disabled individuals have filed *amicus* briefs supporting FLSA coverage of agency home care workers in order to stabilize and strengthen the labor pool that delivers critical services to elderly and disabled individuals. This support makes sense in light of the well-documented shortage of home care workers throughout the United States.[56]

Demographic changes, including longer life expectancy, will intensify this labor shortage in the coming decades. Individuals aged 65 years and older will increase from 12%

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work but cannot afford to go to work when the wages are as low as they are today.").

[55] 118 Cong. Rec. 24,705 (1972).

[56] *See, e.g.*, Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 1-2; Susan Harmuth & Susan Dyson, *Results of the 2005 National Survey of State Initiatives on the Long-Term Care Direct-Care Workforce* 6 (Nat'l Clearinghouse on the Direct Care Workforce & Direct Care Workers Ass'n of N.C.: 2005) (reporting that 29 states considered long-term direct care vacancies to be a "serious" workforce issue) (available at http://www.directcareclearinghouse.org/download/2005_Nat_Survey_State_Initiatives.pdf); LeBlanc et al., *supra* note 43, at 167 (reporting that state officials in 61% of states "reported difficulties finding qualified personal care providers"); Scanlon, *supra* note 24, at 11; Stone, *supra* note 21 at 339, 344 (reporting that 37 states considered recruitment and retention of home care aides to be priority concerns); Robyn I. Stone & Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* 3-4, 9, 12-16 (The Urban Institute & American Ass'n of Homes and Servs. for the Aging: Oct. 2001) (available at http://www.rwjf.org/files/ research/WhoWillCareforUsReport.pdf).

of the population today to 21% by 2050,[57] and those who are 85 and older will double by 2030 and triple or quadruple by 2040.[58] These trends will produce significant increases in the demand for home care services, with the number of elderly individuals in need of personal assistance services projected to rise from 13 million in 2000 to 27 million by 2050, and working-age individuals in need of assistance due to disability predicted to increase from 5 million to 8 million during the same time period.[59]

As a result, employment of home health aides is projected to increase by 56% just in the decade between 2004 and 2014, making it the fastest growing occupation in the nation; employment of personal and home care aides is expected to grow by 41% during the same time period, making it tenth on that list.[60] As of 2004, federal statistics documented 701,000 personal home care aides and 624,000 home health care aides.[61] By 2014, the Bureau of Labor Statistics projects a

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[57] UCSF Health Workforce Studies, *supra* note 10, at 13 (citing Congressional Budget Office, *The Looming Budgetary Impact of Society's Aging* (2002)).

[58] Nora Super, National Health Policy Forum Background Paper, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand* 2 (Jan. 23, 2002) (available at http://www.nhpf.org/pdfs_bp/BP_Caregivers_1-02.pdf) (2040 projections); Scanlon, *supra* note 24, at 9 (2030 projections).

[59] Kaye, *supra* note 19, at 1113 (elderly estimates); U.S. Dep't Health and Human Servs and U.S. Dep't of Labor, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation* 5 (2003) (available at http://www.pascenter.org/publications/publication_home.php?id=61) (working-age disabled individuals).

[60] Bureau of Labor Statistics, *supra* note 14 (Tomorrow's Jobs); Daniel E. Hecker, *Occupational Employment Projects to 2014*, Monthly Labor Rev., Nov. 2005, at 75 (citing BLS statistics).

[61] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Hecker, *supra* note 60, at 75 (citing BLS statistics). These statistics may underestimate the

need for 974,000 home health aides and 988,000 personal and home care aides.[62]

However, the demographics of those who provide the services are not keeping up with those in need of them. While the population over age 85 will double in the next 30 years, the number of persons in the demographic of most home care workers will increase by just 9%.[63] The General Accounting Office has developed a calculation called the "elderly support ratio," which represents the ratio of women aged 20-54 (the gender and age group currently providing the vast majority of care) to persons aged 85 and over. In 2000, that ratio was 16:1. The ratio will drop to 12:1 by 2010, 9:1 by 2030, and 6:1 by 2040.[64] Nor is that gap likely to be filled by informal, uncompensated care; the number of potential family caregivers for each person needing care is projected to decrease from 11 in 1990 to 4 in 2050.[65]

The current labor shortage is largely attributable to the lack of competitive wages and the demanding nature of the

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actual number of home health care workers significantly, by undercounting individuals hired directly by households. Stone, *supra* note 21, at 340.

[62] Hecker, *supra* note 60, at 75 (citing BLS statistics).

[63] Scanlon, *supra* note 24, at 9. The total working age population (persons aged 18 to 64) will grow by just 16% during this time period. *Id.*

[64] Scanlon, *supra* note 24, at 9; UCSF Health Workforce Studies, *supra* note10, at 34 http://www.futurehealth.ucsf.edu/geria/062404-Geria%20 Final.pdf) (citing United States General Accounting Office, *GAO analysis of U.S. Census Bureau projections of total resident population*, Middle Series (Dec. 1999)). The ratio of the entire working age population to the population over 85 will go from 39.5 workers per elderly person in 2000 to 22.1 in 2030 and 14.8 in 2040. Scanlon, *supra* note 24, at 9. These figures assume relatively high immigration, one million net annually, through 2030. UCSF Health Workforce Studies, *supra* note 10, at 35.

[65] Super, *supra* note 58, at 3 (citing National Family Caregivers Association, Family Caregiving Statistics, Kensington, Maryland, 2000).

work.[66] The Bureau of Labor Statistics found that the earnings of home care workers "remain among the lowest in the service industry," with a 1998 mean annual income for home health aides of $16,250 and for home care aides of $14,920.[67] In 1998, one in ten home care aides earned less than $12,300 per year, below the poverty level for a family of three.[68]

Many potential home care workers have the option to choose jobs that are better paying or less demanding than home care, and those that do choose home care work turn over rapidly.[69] Turnover, attributable to low wages and the physically and emotionally demanding nature of the work,[70] has been estimated at 40-100% per year by agencies interviewed for a recent news article and at 12-60% by the United States Department for Health and Human Services.[71] This

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[66] General Accounting Office, *supra* note 45, at 35.

[67] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483 (citing BLS Occupational Employment Statistics survey).

[68] *Id.*

[69] Scanlon, *supra* note 24, at 12; Seavey & Salter, *supra* note 51, at 1-2. In 2000, file clerks earned more than home health aides and significantly more than personal and home care aides. Paraprofessional Healthcare Institute, *Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions* 19 (Citizens for Long-Term Care: 2003) (available at http://www.paraprofessional.org/publications/CLTC_doc_rev1.pdf) (citing BLS data).

[70] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Yamada, *supra* note 17, at 204.

[71] Gross, *supra* note 35; Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 14 (citing R. Stone, *Frontline Workers in Long-Term Care: A Background Paper* (Institute for the Future of Aging Services: 2001)); Seavey & Salter, supra note 51, at 2 (40-50% annual turnover); Super, *supra* note 58, at 4 (national turnover of 28%); New York Association of Homes & Services for the Aging, *The Staffing Crisis in New York's Continuing Care System: A Comprehensive Analysis and*

turnover is expensive, costing approximately $3,362 each time a worker needs to be replaced.[72] It also tends to diminish the quality and continuity of patient care.[73]

This labor shortage has already produced adverse consequences for home care clients. Medicaid home care clients have filed lawsuits in federal and state court challenging home care payment rates on the ground that their inadequacy has caused a shortage of necessary services.[74] They have documented incidents where individuals in need of critical services have been trapped for hours in bed or in a bathroom, or without food or water, because of the unavailability of

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Recommendations 17 (2000) (available at http://www.nyahsa.org/docs/Staff.pdf) (40-60% turnover in one year and 80-90% in 2 years).

[72] Stone, *supra* note 21, at 341. Stone points out that this figure does not even take into account lost productivity during time that new workers are trained and gain experience, or the attrition between initial hiring and placement. *Id.*

[73] *Id.*

[74] Seavey & Salter, *supra* note 51, at 14-17. The legal claims in these actions have been based on requirements of the Medicaid statute and federal prohibitions against discrimination based on disability. Two cases have resulted in settlements: a federal lawsuit that prompted Mississippi to agree to increase payments to personal care attendants by $0.50 per hour and to seek funding from the legislature for additional pay increases, and a state court case that caused New Hampshire to agree to establish a new rate-setting methodology based on the average cost of providers. *Id.* A California lawsuit was dismissed on the ground that the Medicaid statute does not confer individually enforceable rights and that the state was not violating disability law. *Sanchez v. Johnson*, 416 F.3d 1051, 1061, 1067-68 (9th Cir. 2005). A district court order, requiring Arizona to offer a rate of pay that guarantees that clients will receive the services for which they qualify, is on appeal to the Ninth Circuit. *Ball v. Biedess*, 2004 WL 2566262 **6-7 (Aug. 13, 2004), *on appeal sub nom. Ball v. Rodgers*. A class has been certified and a motion to dismiss denied in a pending Wisconsin case. *See Nelson v. Milwaukee County*, 2006 WL 290510, No. 04-C-193 (E.D. Wis. Feb. 7, 2006); *Bzdawka v. Milwaukee County*, 238 F.R.D. 469 (E.D. Wis. Oct. 13, 2006).

home care aides. *See, e.g., Ball*, 2004 WL 2566262 at *4 & n.3. The critical shortage of home care aides also "encourage[s] unnecessary and premature institutional placements among Medicaid participants."[75] Those unnecessary placements, in turn, cost the federal and state governments far more than would otherwise be spent on home care services.[76]

In sum, Petitioners and *amici* have it exactly backwards: it is the *lack* of FLSA coverage for agency-employed home care workers that threatens the quality and availability of home care services. Excluding these workers from FLSA has contributed to a widening gap between the demand for home care services and the supply of individuals who are willing to commit to such underpaid and difficult work. And as the 1974 Congress recognized, providing FLSA coverage would help to remedy this critical shortage of labor.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[75] LeBlanc et al., *supra* note 43, at 170.

[76] LeBlanc et al., *supra* note 43, at 168-69 (states spent average of $6,870 per Medicaid personal care client in 1997-98 and $19,077 per Medicaid nursing facility resident in 1997).